

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RICHARD O'HEARN, individually and on behalf of all others similarly situated,

**Plaintiff,**

V.

LES SCHWAB WAREHOUSE  
CENTER, INC. and LES SCHWAB  
TIRE CENTERS OF WASHINGTON,  
INC.,

## Defendants.

C13-2005 TSZ

## ORDER

THIS MATTER comes before the Court on plaintiff's motion for class

certification, docket no. 20. Having reviewed all papers filed in support of, and in opposition to, plaintiff's motion, the Court enters the following order.

## Background

Defendant Les Schwab Tire Centers of Washington, Inc. (“Les Schwab”) operates 114 stores in Washington. Hueske Decl. at ¶¶ 2 & 4 (docket no. 25). Les Schwab is affiliated with defendant Les Schwab Warehouse Center, Inc. (“LSWCI”), but neither defendant is the parent or subsidiary of the other. See id. at ¶ 2; Corporate Disclosure Statement (docket no. 8). Les Schwab stores provide a limited range of parts and services for motor vehicles, including replacement wheels and tires, as well as brake.

1 battery, and alignment services. Hueske Decl. at ¶ 5. Some Les Schwab stores focus  
2 exclusively on passenger vehicles or “retail” customers, while others have a mix of  
3 business, including maintenance of fleets, construction or logging equipment, commercial  
4 trucks, and/or farm or ranch equipment, depending on location. *Id.* Les Schwab has a  
5 decentralized structure in which each store operates like an independent business, with a  
6 store’s management having almost complete control over how its own store is run. *Id.* at  
7 ¶ 12.

8 Les Schwab stores generally open at 8:00 a.m. six days a week, and close at 6:00  
9 p.m. on weekdays and 5:00 p.m. on Saturdays. *Id.* at ¶ 6. The hours may vary by store  
10 and as a result of weather or business conditions. *Id.* Prior to January 1, 2013, Les  
11 Schwab stores generally had a Store Manager, one or more Assistant Managers, and  
12 hourly positions in three departments, namely Sales & Service, Brake & Alignment, and  
13 Sales & Administrative. *See id.* at ¶ 8; O’Hearn Decl. at ¶ 8 (docket no. 22-19). Store  
14 Managers are entitled to four weeks of vacation per year, generally do not work every  
15 other Saturday, and might be away from their stores for meetings, training, or other  
16 business reasons; when the Store Manager is absent, an Assistant Manager supervises the  
17 store. *See* Hueske Decl. at ¶ 19.

18 Until January 1, 2013, Assistant Managers were compensated on a salary and  
19 profit-sharing basis, and were not paid for overtime. *Id.* at ¶¶ 13, 32-33 (indicating that,  
20 between November 2010 and December 2012, Store Managers and Assistant Managers  
21 shared roughly 30-40% of the net profits of their respective stores); *see also* Ex. Z to  
22 Breckenridge Decl. (docket no. 21-32) (indicating that, on average, Assistant Managers  
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1 earned in excess of \$80,000 per year). Effective January 1, 2013, Assistant Managers  
2 became hourly employees, and the second and third Assistant Manager positions were  
3 eliminated. Hueske Decl. at ¶¶ 32-34; see Bodin Decl. at ¶¶ 4-5 (docket no. 22-3).

4 Les Schwab had been in the process of phasing-out the second and third Assistant  
5 Manager positions since 2008. Hueske Decl. at ¶ 34. In 2008, Les Schwab established a  
6 training program via which hourly employees could get promoted to Assistant Manager.  
7 Id. at ¶ 21. Under this program, a trainee would hold the newly created, hourly position  
8 of Sales & Service Professional for approximately two years, and then be eligible for  
9 promotion. Id. at ¶¶ 21-22. Thirty-six of the 114 stores in Washington now have a Sales  
10 & Service Professional. Id. at ¶ 21. When the remaining second and third Assistant  
11 Manager positions were eliminated in 2013, the individuals holding those jobs were  
12 allowed to work for one year as a Sales & Service Professional. Id. at ¶ 34. If, at the end  
13 of the transition year, they did not secure an Assistant Manager position, they could opt  
14 to work in the Sales & Service department. Id. Many of them, including plaintiff  
15 Richard O'Hearn, elected instead to quit. Id.; O'Hearn Decl. at ¶ 5.

16 Plaintiff was a second Assistant Manager at Store No. 304, located in Bothell,  
17 Washington, from February 2005 until December 2012, and a Sales & Service  
18 Professional at the same store from January 2013 until July 2013, when he resigned.  
19 O'Hearn Decl. at ¶¶ 3, 5, 8. In this litigation, he makes three claims under three different  
20 Washington statutes, namely RCW 49.46.130, RCW 49.48.010, and RCW 49.52.050.  
21 Complaint at ¶¶ 53-70 (docket no. 1). The crux of his claims is that Les Schwab's  
22 Assistant Managers are not exempt from Washington's requirement that employees be  
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1 compensated at 1½ times their regular rate for work in excess of forty hours per week.  
 2 See RCW 49.46.130(1); see also RCW 49.46.010(3). In this motion, plaintiff asks the  
 3 Court to certify a class of all Assistant Managers employed by Les Schwab stores in  
 4 Washington during the three-year limitations period and until December 31, 2012,<sup>1</sup> who  
 5 were classified as “exempt” from Washington’s overtime pay regulations.<sup>2</sup> See Motion at  
 6 14 (docket no. 20 at 21).

7 Plaintiff suggests “[t]his has been done before.” Id. at 1 (docket no. 20 at 8). He  
 8 points to cases in Oregon and California in which a similar class was certified, and  
 9 indicates that “it’s Washington’s turn.” Id. In support of his certification request,

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11 <sup>1</sup> The Court does not view Les Schwab’s decision to convert Assistant Managers to hourly  
 12 employees, effective January 1, 2013, as an admission that, before then, they were incorrectly  
 13 classified under Washington law. See Mitchell v. PEMCO Mut. Ins. Co., 134 Wn. App. 723,  
 14 736-37, 142 P.3d 623 (2006). In creating the Sales & Service Professional position in 2008, and  
 15 beginning to phase out second and third Assistant Managers, Les Schwab was responding to the  
 16 risks associated with its growth as a company, and attempting to more clearly delineate the  
 17 responsibilities of managerial and non-exempt employees. See Ex. W to Breckenridge Decl.  
 18 (docket no. 21-29 at 4). In finally eliminating the positions of second and third Assistant  
 19 Managers, and opting to compensate Assistant Managers on an hourly basis, Les Schwab and its  
 20 sister companies operating in other states were collectively attempting to avoid the possibility of  
 21 inconsistent results in different states, as well as the distraction, disruption, and costs of  
 22 litigation. See Ex. Z to Breckenridge Decl. (docket no. 21-32 at 2). Thus, as in Mitchell, in this  
 23 case, the reclassification does not itself aid the Court in determining whether Les Schwab was  
 previously operating in violation of RCW 49.46.130(1).

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 8 responsibilities of managerial and non-exempt employees. See Ex. W to Breckenridge Decl.  
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 12 inconsistent results in different states, as well as the distraction, disruption, and costs of  
 13 litigation. See Ex. Z to Breckenridge Decl. (docket no. 21-32 at 2). Thus, as in Mitchell, in this  
 14 case, the reclassification does not itself aid the Court in determining whether Les Schwab was  
 15 previously operating in violation of RCW 49.46.130(1).

16 <sup>2</sup> Les Schwab has divided Washington into four areas, and each area has an “Area Store.”  
 17 Hueske Decl. at ¶ 8. The Store Manager of an Area Store also has oversight responsibility for  
 18 other stores in the area and is called an “Area Manager.” Id. at 17. An Area Store has both an  
 19 Assistant Manager and an Area Store Assistant Manager. Id. at ¶¶ 8 & 17. In a suit in  
 20 Multnomah County Circuit Court, a jury found, pursuant to Oregon law, that an “executive  
 21 exemption” applied as to Area Store Assistant Managers, but not to Assistant Managers, making  
 22 the former, but not the latter, ineligible for overtime compensation. Verdict, Ellis v. Les Schwab  
Tire Ctrs. of Portland, Inc., Ex. I to Hollingsworth Decl. (docket no. 24-1 at 207-08). Plaintiff in  
 23 this case was never an Area Store Assistant Manager, and he makes no claim concerning whether  
 Area Store Assistant Managers should be paid for overtime. See Reply at 12 n.61 (docket no. 30  
 at 15).

1 plaintiff contends that the Oregon and California cases are analogous to this one, and that  
2 Les Schwab and LSWCI collectively control “all aspects” of store operations through  
3 detailed policies, manuals, and job descriptions, as well as training programs. His basic  
4 premise is that Les Schwab and LSWCI together ensured uniformity among all Assistant  
5 Managers in Washington with respect to their daily activities, which did not qualify them  
6 as “exempt” from overtime compensation. Plaintiff argues that any variation in the  
7 responsibilities of Assistant Managers from store to store did not alter the nature of their  
8 “primary duty,” which did not distinguish them from non-exempt, hourly employees.

9       Contrary to plaintiff’s assertion, however, the order certifying an “overtime  
10 subclass” in the Oregon case, *Ellis v. Les Schwab Tire Ctrs. of Portland, Inc.*, Ex. H to  
11 Hollingsworth Decl. (docket no. 24-1 at 185-203), which did not apply the standards for  
12 class certification that govern in federal court, and which predated the United States  
13 Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), is of  
14 no persuasive value. Indeed, in the Oregon case, unlike in this case, the five defendants  
15 (only one of which, namely LSWCI, is also sued in this case) did not even dispute that  
16 the commonality requirement for class certification had been met. Order at 9 (docket  
17 no. 24-1 at 193). In addition, the two California cases on which plaintiff relies involved  
18 classes certified solely for settlement purposes, *see* Hueske Decl. at ¶¶ 27-29; *see also*  
19 Stipulation at ¶ 2.7, *Rogers v. Les Schwab Tire Ctrs. of Cal., Inc.*, Ex. E to Breckenridge  
20 Decl. (docket no. 21-5 at 13) (“Defendant . . . denies that, for purposes other than the  
21 settling of this Action, any part of this Action is appropriate for class treatment.”), and a  
22 third case from California, which was before the same judge as one of the two cases cited  
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1 by plaintiff, Hueske Decl. at ¶ 27, contradicts plaintiff's representation that certification  
 2 of the proposed class "has been done before," *see Gerard v. Les Schwab Tire Ctrs. of*  
 3 *Cal., Inc.*, Ex. G to Hollingsworth Decl. (docket no. 24-1 at 176-183).<sup>3</sup>

4 As a result, the Court now begins its analysis with the proverbial clean slate.  
 5 Having thoroughly reviewed the materials submitted by the parties, the Court concludes  
 6 that the record does not reveal the type of homogeneity among Assistant Managers  
 7 concerning their duties or the manner in which their duties were performed that would  
 8 justify certifying a class.

9 **Discussion**

10 **A. Standard for Class Certification**

11 Rule 23 operates as "an exception to the usual rule that litigation is conducted by  
 12 and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 133 S.  
 13 Ct. 1426, 1432 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). To  
 14 maintain a class action, plaintiff must "affirmatively demonstrate" compliance with  
 15 Rule 23. *Id.* (citing *Wal-Mart*, 131 S. Ct. at 2551). The prerequisites of Rule 23 are not  
 16 mere pleading standards, but rather are evidentiary thresholds. *Id.* Thus, plaintiff bears

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 18 <sup>3</sup> In *Gerard*, the proposed class consisted of Store Managers, as opposed to Assistant Managers,  
 19 but the plaintiff's arguments in favor of class treatment were virtually identical to those being  
 20 made in this case. Order at 3-4 (docket no. 24-1 at 179-80). The *Gerard* Court was "not  
 21 persuaded that the issue of whether the managers were properly designated as exempt can be  
 22 determined purely on the basis of defendant's standardized policies or by the type of sampling  
 23 proposed by plaintiff's expert." *Id.* at 4 (docket no. 24-1 at 180). Moreover, the *Gerard* Court  
*Gerard*, class certification was denied with respect to the overtime claim. *Id.*

1 the burden of proving, not just simply alleging, that all four requirements of Rule 23(a)  
2 are satisfied, and that the proposed class qualifies under at least one of the three  
3 provisions of Rule 23(b). *Id.* Plaintiff in this case pursues certification solely under  
4 Rule 23(b)(3).

5 Rule 23(a) mandates that plaintiff prove (1) the class is so numerous that joinder  
6 of all members is impracticable; (2) questions of law or fact common to the class exist;  
7 (3) the representative's claims are typical of the claims of the class; and (4) the  
8 representative will "fairly and adequately" protect the interests of the class. Fed. R. Civ.  
9 P. 23(a). In opposing plaintiff's motion, defendants focus on the second prong of the  
10 Rule 23(a) analysis, arguing that plaintiff cannot establish the requisite commonality.  
11 Defendants also challenge plaintiff's ability to meet the criteria of Rule 23(b)(3), under  
12 which plaintiff must show the case involves "questions of law or fact common to class  
13 members" that "predominate over any questions affecting only individual members" and  
14 as to which "a class action is superior to other available methods for fairly and efficiently  
15 adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

16 **B. Lack of Commonality**

17 Commonality, within the meaning of Rule 23, requires plaintiff to demonstrate  
18 that the claims of all class members depend on "a common contention" of such nature as  
19 "is capable of classwide resolution." *Wal-Mart*, 131 S. Ct. at 2551. The test is whether  
20 the determination of the truth or falsity of such common contention "will resolve an issue  
21 that is central to the validity of each one of the claims in one stroke." *Id.* "What matters  
22 . . . is not the raising of common 'questions' – even in droves – but, rather the capacity of  
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1 a class-wide proceeding to generate common answers apt to drive the resolution of the  
 2 litigation.” *Id.* (emphasis in original, quoting Richard A. Nagareda, *Class Certification in*  
 3 *the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)). The Court must “probe  
 4 behind the pleadings” and engage in a “rigorous analysis” as to whether the prerequisites  
 5 for a class action have been satisfied. *Behrend*, 133 S. Ct. at 1432. The Court’s inquiry  
 6 will necessarily “entail some overlap with the merits” of the underlying claims because  
 7 class certification considerations are generally “enmeshed” in the factual and legal issues  
 8 associated with the causes of action being pursued. *Walmart*, 131 S. Ct. at 2551-52; see  
 9 also *Behrend*, 133 S. Ct. at 1432; *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th  
 10 Cir. 2011) (“[I]t is not correct to say a district court may consider the merits to the extent  
 11 that they overlay with class certification issues; rather, a district court must consider the  
 12 merits if they overlap with the Rule 23(a) requirements.” (emphasis in original)).

13 In this case, although plaintiff frames a common question, namely whether Les  
 14 Schwab should have paid Assistant Managers for overtime prior to January 1, 2013, that  
 15 question cannot be answered on a class-wide basis. See *Ellis*, 657 F.3d at 981 (“[I]t is  
 16 insufficient to merely allege any common question . . . . Instead, [a plaintiff] must pose a  
 17 question that ‘will produce a common answer . . . .’” (citations omitted)). Although  
 18 plaintiff’s claims involve statutes and regulations that apply to all Assistant Managers,  
 19 the question of whether Assistant Managers must receive compensation for overtime  
 20 under those laws has no common answer because the duties of Assistant Managers vary  
 21 from store to store, depending in large part on their respective Store Managers.

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1        **1. Executive and Administrative Exemptions**

2        Under Washington law, “employees” must receive compensation at 1½ times their  
3 regular rate for work in excess of 40 hours per week, unless a statutory exclusion applies.  
4 *See* RCW 49.46.130(1)&(2). For purposes of the overtime law, the term “employee” is  
5 defined to “exempt” a variety of individuals, including those “employed in a bona fide  
6 executive [or] administrative . . . capacity.” RCW 49.46.010(3)(c). Thus, if an Assistant  
7 Manager qualified, during the proposed class period, under either the “executive” or  
8 “administrative” exemption, then Les Schwab would not have been required to pay him  
9 or her overtime, and all three of plaintiff’s claims would lack merit as to that individual.

10       The Washington Department of Labor and Industries (“L&I”) has defined an  
11 “individual employed in a bona fide *executive* capacity” to mean a person “who is  
12 compensated on a salary rate of not less [than] \$250 per week . . . and whose primary  
13 duty consists of the management of the enterprise in which he [or she] is employed . . .  
14 and includes the customary and regular direction of the work of two or more other  
15 employees.” WAC 296-128-510(6). Plaintiff does not dispute that, during the proposed  
16 class period, he and other Assistant Managers received salaries exceeding \$250 per week,  
17 or that he and other potential class members customarily and regularly directed the work  
18 of two or more other employees. Rather, with respect to the “executive” exemption,  
19 plaintiff contends that “management of the enterprise” was not his or other Assistant  
20 Managers’ primary duty.

21       L&I has defined an “individual employed in a bona fide *administrative* capacity”  
22 to mean a person “who is compensated on a salary or fee basis at a rate of not less than

1 \$250 per week . . . and whose primary duty consists of the performance of office or non-  
2 manual work directly related to management policies or general business operations of  
3 his [or her] employer . . . which includes work requiring the exercise of discretion and  
4 independent judgment.” WAC 296-128-520(4)(b). Again, plaintiff does not disagree  
5 that he made the requisite threshold salary. Instead, with respect to the “administrative”  
6 exemption, plaintiff asserts that the performance of office or non-manual work “directly  
7 related to management policies or general business operations” and requiring “the  
8 exercise of discretion and independent judgment” was not his or other Assistant  
9 Managers’ primary duty.

10 The job description for Assistant Manager, however, contradicts plaintiff’s views  
11 concerning his and other Assistant Managers’ “primary duty.” The job description  
12 indicates that the Assistant Manager supports the Store Manager (also known as the Tire  
13 Center Manager) in “all aspects of store management and operations.” Ex. U to  
14 Breckenridge Decl. (docket no. 21-27). The Assistant Manager is “responsible for  
15 meeting sales, marketing, and financial performance goals; operating in compliance with  
16 Company standards, policies, procedures, and federal, state, and local laws; supervising  
17 all Tire Center employees; monitoring activities in the service bays; taking action to  
18 prevent and resolve safety issues as necessary; and performing technical duties (for  
19 example, tire/wheel repair and installation) as needed to train employees, demonstrate the  
20 use of tools/equipment, intervene and correct unsafe work procedures, and provide  
21 assistance in the service bays.” *Id.*

1           **2.        Declarations Submitted by Plaintiff**

2           Although the job description for Assistant Manager reflects a role that satisfies the  
 3 requirements of both the “executive” and “administrative” exemption, plaintiff argues  
 4 that, in practice, Assistant Managers spend the bulk of their time performing the same  
 5 work as hourly employees. Plaintiff offers, in addition to his own declaration, evidence  
 6 from 23 other former Assistant Managers and two current Assistant Managers. See  
 7 Exs. 1-26 to Berman Decl. (docket no. 22).<sup>4</sup> One of the two current Assistant Managers  
 8 states that he does “very little in terms of managerial tasks” and spends his “entire day”  
 9 doing the same job as an hourly employee. Medcalf Decl. at ¶¶ 14, 15, & 18 (docket  
 10 no. 22-18). The other current Assistant Manager indicates that, in addition to performing  
 11 many of the same tasks as hourly employees, he creates a daily budget, removes and then  
 12 returns the till to the safe each day, deals with the cash on hand, submits daily reports to

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14           <sup>4</sup> Plaintiff also relies on various policies and manuals, but none of them support plaintiff’s theory  
 15 that Assistant Managers performed predominantly non-managerial work. See Sherry Decl. at ¶ 4  
 16 (docket no. 26) (indicating that Les Schwab has never maintained a policy or practice requiring  
 17 Assistant Managers to devote the majority of their time to non-managerial activities). Neither  
 18 the policy manual, Ex. P to Breckenridge Decl. (docket no. 21-22), nor the code of conduct,  
 19 Ex. G to Breckenridge Decl. (docket no. 21-7), enumerate the daily tasks of Assistant Managers  
 20 or specify how managerial duties should be shared between Store Managers and Assistant  
 21 Managers. See Sherry Decl. at ¶¶ 6-8 & 11. The operations manual, which plaintiff did not  
 22 actually submit, see Ex. Q to Breckenridge Decl. (docket no. 21-23) (appending only the table of  
 23 contents), has long been obsolete, and stores have been advised not to use or rely on it, see  
 Sherry Decl. at ¶ 12. The training materials proffered by plaintiff, Ex. M to Breckenridge Decl.  
 (docket nos. 21-13 through 21-19), are aimed at Sales & Service Professionals, who are hourly  
 employees, and their supervisors, who must certify that they have satisfactorily completed the  
 instructional program. Other documents submitted by plaintiff address specific topics like  
 customer credit or accounting, Exs. R & T to Breckenridge Decl. (docket nos. 21-24 & 21-26),  
 or administrative matters like reimbursement for business expenses, dress codes, and termination  
 procedures, Ex. S to Breckenridge Decl. (docket no. 21-25). If plaintiff’s voluminous materials  
 contain a directive to Assistant Managers concerning how they should spend their time each day,  
 plaintiff has failed to cite it, and the Court has not independently discovered it.

1 Les Schwab headquarters, assigns employees to specific vehicles needing service and to  
 2 other duties, runs credit reports, and handles customer complaints. Harper Decl. at ¶¶ 8,  
 3 12, 13, 14(b), & 15 (docket no. 22-10). He is also involved in the hiring process, but has  
 4 not participated in firing any employees over the past three years or in any performance  
 5 reviews for the past year and a half. *Id.* at ¶ 14. In contrast to Medcalf's testimony that  
 6 he has virtually no managerial responsibilities, Harper estimates that he spends between  
 7 30 and 40 percent of his day on managerial activities. *See id.* at ¶ 16.

8       Like Harper, and unlike Medcalf, the various former Assistant Managers whose  
 9 declarations have been offered by plaintiff describe duties that were entrusted to them  
 10 and not to hourly employees. With one exception, each of the former Assistant Managers  
 11 provides an estimate concerning the amount of time devoted to purely managerial tasks,  
 12 ranging in value from 5 to 30 percent of the day. *See* Exs. 1-9, 11-17, 19-26 to Berman  
 13 Decl. (docket no. 22). Some of these former Assistant Managers<sup>5</sup> represent that they  
 14 were not involved in the hiring, firing, or performance review process; however, most of  
 15 them, including plaintiff,<sup>6</sup> report playing a role in acquiring new employees, training and

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 17       <sup>5</sup> *See* Bodin Decl. at ¶ 13 (docket no. 22-3); Coe Decl. at ¶ 17 (docket no. 22-6); Harrison at ¶ 14  
 18 (docket no. 22-11); Palin Decl. at ¶ 14 (docket no. 22-20); *see also* Lloyd Decl. at ¶ 13 (docket  
 19 no. 22-17) (was involved in hiring before November 2010, but not afterwards).

20       <sup>6</sup> *See* O'Hearn Decl. at ¶ 14 (docket no. 22-19); *see also* Bawdon Decl. at ¶ 13 (docket no. 22-1);  
 21 Blair Decl. at ¶ 18 (docket no. 22-2); Campbell Decl. at ¶ 17 (docket no. 22-4); Franklin Decl. at  
 22 ¶¶ 15-17 (docket no. 22-7); Grigsby Decl. at ¶ 16 (docket no. 22-8); Hardin Decl. at ¶¶ 12-14  
 23 (docket no. 22-9); Hatt Decl. at ¶ 16 (docket no. 22-12); Heier Decl. at ¶¶ 17-19 (docket no. 22-  
 24 13); Heller Decl. at ¶ 12 (docket no. 22-14); Larson Decl. at ¶ 18-21 (docket no. 22-15); Lewis  
 25 Decl. at ¶ 17 (docket no. 22-16); Pedder Decl. at ¶ 16 (docket no. 22-21); Reynolds Decl. at ¶ 12  
 26 (docket no. 22-22); Thornhill Decl. at ¶ 15 (docket no. 22-23); Uptegrove Decl. at ¶ 13 (docket  
 27 no. 22-24); White Decl. at ¶ 12 (docket no. 22-25); Willard Decl. at ¶ 15 (docket no. 22-26).

1 supervising hourly workers, and/or discharging individuals when necessary for financial  
2 or other reasons. Similar to Harper and many of the former Assistant Managers, plaintiff  
3 indicates in his declaration that he also engaged in the following managerial activities:  
4 preparing daily reports, opening the till in the morning and storing it in the safe each  
5 night, preparing the daily deposit, running credit reports, and approving or denying credit  
6 applications. O’Hearn Decl. at ¶¶ 10, 15, & 16 (docket no. 22-19). In addition, plaintiff  
7 states that he did manual labor to prepare the store for opening, including readying the  
8 equipment, opening the service bays, and making coffee and popcorn, as well as to close  
9 the store for the evening, including shutting down the equipment, putting away tools,  
10 closing the doors, and performing janitorial tasks such as cleaning toilets, wiping  
11 counters, and mopping or sweeping floors.<sup>7</sup> *Id.* at ¶¶ 11 & 16. According to plaintiff,  
12 during the generally 12-hour workday, all but two hours of his time was spent “in the  
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14 <sup>7</sup> The extent to which Assistant Managers engage in janitorial work appears to vary from store to  
15 store. Some stores incur the additional costs of outside cleaning services or dedicated janitorial  
16 employees. See Gonzalez Decl. at ¶ 14 & Wiggins Decl. at ¶ 24, Exs. 9 & 24 to Stafford Decl.  
17 (docket no. 27); see also Graddy Decl. at ¶ 5, Ex. 10 to Stafford Decl. (indicating that the store  
18 has both a cleaning service and a part-time janitorial employee because the Store Manager and  
19 Assistant Manager “think investing in cleanliness is worthwhile in improving the image of the  
20 store and the quality of the customer experience” and in “set[ting] the right tone for our crew”).  
21 Other stores engage janitorial vendors on a part-time or seasonal basis. See Harrison Decl. at  
22 ¶ 11 (docket no. 22-11) (two days per week); Heier Decl. at ¶ 12 (docket no. 22-13) (three or  
four days per week); Hesner Decl. at ¶ 14, Ex. 11 to Stafford Decl. (all but two days per week);  
Ruetsch Decl. at ¶ 27, Ex. 21 to Stafford Decl. (full-time for nine months and part-time for the  
three slowest months of the year); Thueson Decl. at ¶ 14, Ex. 23 to Stafford Decl. (a cleaning  
service is contracted for all months except January and February, during which the person who  
cleans, either the Assistant Manager or one or more hourly employees, depends on how busy the  
store is); see also Thornhill Decl. at ¶ 16 (docket no. 22-23) (explaining that, because the  
janitorial vendor did not service the bathrooms, the Assistant Manager cleaned the men’s room,  
while an hourly employee cleaned the women’s room). At least one store relies exclusively on  
the Assistant Manager to keep things tidy. See Grigsby Decl. at ¶¶ 10 & 14 (docket no. 22-8).

1 bays or at the service counter performing the same tasks as the hourly employees.” *Id.* at  
 2 ¶¶ 10, 16, & 17.

3       Defendants suggest that plaintiff’s declaration is “entirely at odds” with his  
 4 deposition testimony, as well as with statements he made when applying for his current  
 5 job. *See* Response at 16 (docket no. 23 at 18). In his deposition, plaintiff acknowledged  
 6 that he had managerial duties beyond those mentioned in his declaration.<sup>8</sup> Moreover, in  
 7 seeking employment with Edward Jones as a financial advisor, plaintiff touted his  
 8 management experience with Les Schwab, indicating that he was responsible for  
 9 “meeting sales, marketing, and financial goals,” supervising employees, developing  
 10 selling strategies and new customer accounts, managing customer credit accounts,  
 11 preparing and monitoring budgets, and resolving customer complaints. Ex. E to  
 12 Hollingsworth Decl. (docket no. 24-1 at 157). The Court draws no conclusion

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13  
 14       <sup>8</sup> Plaintiff agreed that, as Assistant Manager, he was responsible for ensuring that employees  
 15 conducted themselves in a manner consistent with Les Schwab policies. O’Hearn Dep. at 104:2-  
 16 10, Ex. A to Hollingsworth Decl. (docket no. 24-1). Plaintiff also acknowledged that “an  
 17 important part” of his job as Assistant Manager was training the crew. *Id.* at 60:2-5. Plaintiff  
 18 was required to stay abreast of new developments so that he could properly train his  
 19 subordinates. *Id.* at 79:3-19. During the course of the day, he would quiz the workers as a way  
 20 of helping them learn. *Id.* at 252:7-253:1. With regard to scheduling, plaintiff testified that, to  
 21 save on wages, he regularly sent employees home early when work was slow, generally after  
 22 consulting with the other Assistant Manager and/or the Store Manager, depending on who was at  
 23 the store. *Id.* at 124:6-126:1. In addition, plaintiff set the monthly schedule, meaning that he  
 24 determined which employees would start work on a given day at a particular time. *Id.* at 185:7-  
 25 187:6. If crew members were behaving improperly, plaintiff would pull them aside, without  
 26 needing to obtain the Store Manager’s permission, and counsel them about how they could  
 27 improve. *Id.* at 268:2-9. Plaintiff also had responsibility for checking the accuracy of hourly  
 28 employees’ timesheets, *id.* at 269:25-270:3, and for reporting any on-the-job accidents, *id.* at  
 29 154:10-21. *See also* Layson Decl. at ¶ 26, Ex. 14 to Stafford Decl. (docket no. 27-2 at 28)  
 30 (indicating that Layson’s role as Assistant Manager included completing workers’ compensation  
 31 forms when employees got injured, and then subsequently ensuring that they worked within their  
 32 medical restrictions).

1 concerning whether plaintiff's declaration is inconsistent with his deposition testimony  
 2 and/or prior statements, but observes that the questions raised concerning plaintiff's  
 3 credibility demonstrate the difficulty, in this particular case, of assessing the "exempt" or  
 4 "non-exempt" status of just one individual, let alone an entire class.

5 **3. Declarations Submitted by Les Schwab**

6 In opposing plaintiff's motion for class certification, Les Schwab has submitted  
 7 declarations from 26 individuals currently employed as Assistant Manager, Area Store  
 8 Assistant Manager, or Store Manager. See Exs. 1-26 to Stafford Decl. (docket no. 27).  
 9 Each of the Store Managers was previously an Assistant Manager at a different store.<sup>9</sup>  
 10 Together, these declarations paint a vastly different picture than those provided by  
 11 plaintiff. Rather than attempting to segregate managerial from non-managerial duties,  
 12 these declarants talk of "juggl[ing] a lot of balls and deal[ing] with everything all at  
 13 once" while an Assistant Manager. Paxton Decl. at ¶ 12, Ex. 19 to Stafford Decl.; see  
 14 also id. at ¶ 21 ("As an Assistant Manager, I could not focus on just one thing at a time  
 15 because whatever I was not paying attention to tended to 'catch on fire.'"). As one  
 16 current Store Manager explains, when he was an Assistant Manager, he "could not just  
 17 put [his] head down and work with 'blinders' on." Ferrell Decl. at ¶ 20, Ex. 5 to Stafford  
 18 Decl.<sup>10</sup> Rather, he had to "monitor everything that was happening in the bays" and make  
 19

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20 <sup>9</sup> To become a Store Manager, an individual must first serve as an Assistant Manager and then  
 21 must apply to be placed on the "manager's list." Hueske Decl. at ¶ 26. Once on the "manager's  
 list," the individual may "run" for an open Store Manager position. Id.

22 <sup>10</sup> See also Wolf Decl. at ¶ 20, Ex. 26 to Stafford Decl. ("My core job as a[n Assistant M]anager  
 23 was to manage the work to make sure it got done. For example, if we told a customer we would

1 sure that employees stayed on task and were effectively communicating, while also  
 2 “watching customers’ body language to see if they appear[ed] unhappy about something”  
 3 and then working to resolve any issues. *Id.* Similarly, a current Assistant Manager  
 4 indicates that, even when he is working on changing a vehicle’s tires, he is still training --  
 5 he is simultaneously making sure that crew members are following procedures and asking  
 6 them questions to test their knowledge. See Allcock Decl. at ¶ 15, Ex. 1 to Stafford  
 7 Decl.<sup>11</sup>

8 The declarations submitted by Les Schwab reflect that the role of an Assistant  
 9 Manager varies depending on the particular Store Manager. For example, the Assistant  
 10 Manager at Store No. 330 in Cheney, Washington, has worked with two different Store  
 11 Managers. Thueson Decl. at ¶¶ 2 & 5, Ex. 23 to Stafford Decl. Thueson describes  
 12 working with the first Store Manager, Rich Reiman, as “trial by fire” because Reiman  
 13 simply said to him, “Here is your key. This is your store. You run it.” *Id.* at ¶ 17.  
 14 Reiman retired in 2011, and the new Store Manager, Brad Horst, has taken a more

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15  
 16 have their car ready in twenty minutes, I would assign two employees to get the job done on  
 17 time. I had to keep my head on a swivel and be aware of my surroundings at all times. I did  
 18 often work on cars myself when I was in the bays, but I tried to stay paired with another  
 19 employee when I could because I constantly got pulled in other directions.”).

20 <sup>11</sup> See also Amrhein Decl. at ¶ 17, Ex. 2 to Stafford Decl. (“I chose to work on cars or clean parts  
 21 of the store myself from time to time . . . because it was important for employee morale . . . I  
 22 also sometimes needed to work on a vehicle as a training mechanism. For example, if we got an  
 unusual vehicle (like a Ford Model T), I would work on the car myself, but I would also train an  
 employee while I did so. That way, the next time that employee would know how to handle the  
 situation.”); McManus Decl. at ¶ 15, Ex. 18 to Stafford Decl. (“I constantly look for training  
 opportunities for our crew. . . . I try to quiz the crew in the bays when we aren’t too busy. I also  
 do on-the-job training on sales skills . . . . Sometimes this means having them try to sell me tires.  
 Other times it’s me quizzing them about different types of tires and vehicles or showing them  
 what needs to be done on a particular model vehicle.”).

23

1 interactive approach. See id. at ¶¶ 5, 12-22, & 30. Horst and Thueson now meet two or  
2 three Fridays a month for breakfast and discuss strategies for more effectively running  
3 the store. Id. at ¶ 13. They work together on the hiring and performance review process,  
4 on managing net profits on a daily basis, and on implementing crew training programs  
5 and conducting store-wide meetings. Id. at ¶¶ 13, 17-18, 26-30. In contrast, when  
6 Reiman was the Store Manager, Thueson had made all hiring decisions on his own, and  
7 the store's profit had been managed on an annual basis, with less successful results. Id. at  
8 ¶¶ 18 & 19. Other declarations offered by Les Schwab contain similar observations  
9 about a change in supervision. See Ruetsch Decl. at ¶¶ 6-8, Ex. 21 to Stafford Decl.  
10 (indicating that the previous Store Manager had been "hands off" and that, because  
11 Ruetsch had been used to running things on his own, he "initially butted heads" with the  
12 replacement Store Manager, but in the end, he and the new Store Manager were able to  
13 work well together, opting for a month-at-a-time approach to managing the store); see  
14 also Ferrell Decl. at ¶¶ 7-10 & 19, Ex. 5 to Stafford Decl. (explaining that the prior Store  
15 Manager had "established ways of doing things," but the new Store Manager was "laid  
16 back and not as set in his ways," meaning that Ferrell "had a fresh start" and "took on  
17 more responsibility for managing all areas of the store").

18 The declarations provided by Les Schwab also illustrate how the role of Assistant  
19 Manager is different from store to store as a result of size, location, and mix of business.  
20 See Maynard Decl. at ¶¶ 2 & 7-9, Ex. 16 to Stafford Decl. (describing his transfer from a  
21 large store in Smokey Point with a thriving commercial business, where Maynard  
22 operated with substantial autonomy, hiring employees and conducting performance

1 reviews on his own, to a much smaller retail store in Bellingham, where he works with a  
 2 more hands-on Store Manager); see also Bender Decl. at ¶¶ 3-11, Ex. 3 to Stafford Decl.  
 3 (comparing the small retail store in Kent, where he was able to micromanage and “have a  
 4 hand in everything,” with the full-service store in Quincy,<sup>12</sup> which has a large volume of  
 5 commercial sales, where he is required to delegate); Hesner Decl. at ¶¶ 4, 8, & 14, Ex. 11  
 6 to Stafford Decl. (discussing the change in duties upon moving from a small retail store  
 7 in Tacoma to an Area Store in Vancouver, with four times as many employees). The  
 8 disparity between stores is further demonstrated in the declarations submitted by  
 9 plaintiff,<sup>13</sup> which vary from no managerial involvement by the current Assistant Manager

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11 <sup>12</sup> Cf. Martin Decl. at ¶¶ 6 & 19, Ex. 15 to Stafford Decl. (Martin was Bender’s predecessor at the  
 12 Quincy store, and he states that the Store Manager of the Quincy store changed in early 2012, but  
 13 the type of 50/50 partnership between the Store Manager and the Assistant Manager remained  
 14 the same).

15 <sup>13</sup> Notably, very few of the 52 individuals who have provided declarations worked together. Two  
 16 declarants, however, who served as Assistant Managers at the same store, namely Store No. 334  
 17 in Longview, have contradictory recollections of their shared experiences. Compare Bodin Decl.  
 18 (docket no. 22-3) with Gamble Decl., Ex. 8 to Stafford Decl. Bodin, who was the second  
 19 Assistant Manager until January 1, 2013, and then served as a Sales & Service Professional until  
 20 September 2013, represents that the Store Manager had responsibility for hiring and firing  
 21 decisions and for conducting performance reviews, and that he was not involved, except for  
 22 occasionally participating in reviews. Bodin Decl. at ¶¶ 3 & 13. In contrast, Gamble states that  
 23 the Store Manager was out of the store 40-50% of the time, and that he and Bodin essentially ran  
 the store together. Gamble Decl. at ¶¶ 6 & 13. Gamble indicates that both he and Bodin “took  
 the lead on hiring,” that he and Bodin would talk if an employee needed to be disciplined or fired  
 and then whichever one of them was more familiar with the issue would raise it with the Store  
 Manager, and that either he or Bodin would be in any termination meeting, along with the Store  
 Manager. Id. at ¶¶ 18 & 20. Although the Court need not make any credibility determinations  
 for purposes of the pending motion, the Court notes that Les Schwab has proffered evidence that  
 Bodin was disciplined for failing to properly address the misconduct of an hourly employee and  
 then failing to be forthcoming during a subsequent investigation. Hueske Decl. at ¶ 35(3) &  
 Ex. D. Bodin was, however, successful later in making the “manager’s list” and receiving an  
 offer to be a Store Manager. Id.; Bodin Decl. at ¶ 6. He did not accept the position because it  
 would have required him to move to Denver, away from his children. Bodin Decl. at ¶ 6.

1 at Store No. 417 in Bellingham, a commercial store requiring the Assistant Manager to  
2 spend substantial time on the road performing service calls, Medcalf Decl. at ¶¶ 3-4, 11,  
3 14, & 18 (docket no. 22-18), to significant participation by the former Assistant  
4 Managers at Store Nos. 363 and 318 in North Bend and Battleground, respectively, in the  
5 hiring, firing, and performance review processes, Bawdon Decl. at ¶ 13 (docket no. 22-1);  
6 Blair Decl. at ¶ 18 (docket no. 22-2), to the current Assistant Manager at Store No. 378 in  
7 Federal Way, a store with a mix of retail and commercial business, spending as much as  
8 40% of the work day on solely managerial functions, Harper Decl. at ¶¶ 6 & 16 (docket  
9 no. 22-10).

10       **4. Applicable Standard: “Relative Importance” of**  
11       **Managerial Duties to Employer’s Functioning**

12       Plaintiff criticizes Les Schwab for failing to offer estimates concerning the portion  
13 of each day Assistant Managers devote to managerial activities. The Court is not  
14 persuaded that a strict apportionment of time constitutes an appropriate method for  
15 analyzing the type of supervisory role at issue in this case. *See Donovan v. Burger King*  
16 *Corp.*, 672 F.2d 221, 226 (1st Cir. 1982). As observed by the First Circuit in *Donovan*,  
17 “one can still be ‘managing’ if one is in charge, even while physically doing something  
18 else.” *Id.* The facts of *Donovan* are similar to those at issue in this case. As explained in  
19 *Donovan*, Burger King restaurants are staffed with a salaried manager, two salaried  
20 assistant managers, and a crew of hourly employees. *Id.* at 223. The manager usually  
21 works during the day, and the assistant managers normally work either the swing or night  
22 shift. *Id.* While on duty, an assistant manager is responsible for scheduling and training  
23

1 employees, assigning work, recordkeeping and cash reconciliation, and overseeing  
2 product quality and inventory; however, assistant managers also spend time performing  
3 many of the same tasks as hourly employees, including taking orders, preparing food, and  
4 distributing purchases to customers. *Id.*

5 The *Donovan* decision concerns Burger King’s appeal from the trial judge’s  
6 conclusion that, under the Fair Labor Standards Act (“FLSA”), overtime compensation  
7 was owed to the assistant managers in the company-owned restaurants in Massachusetts  
8 and Connecticut. *Id.* With respect to assistant managers earning at least \$250 per week  
9 to whom the FLSA’s “short test” applied, meaning that they would be “exempt” from  
10 overtime requirements if *inter alia* their “primary duty” was management, *see* 29 C.F.R.  
11 § 541.100(a) (the salary threshold is now \$455 per week), the First Circuit rejected the  
12 notion that “managing” must occupy over 50% of the work day to qualify as the “primary  
13 duty.” *Id.* at 226. The First Circuit reasoned that, in the context at issue, “a strict time  
14 division” is “misleading.” *Id.* An individual “can manage while performing other work,”  
15 and “this other work does not negate the conclusion that his primary duty is  
16 management.” *Id.* The Court agrees with the First Circuit that apportionment should be  
17 reserved for “situations where the employee’s management and non-management  
18 functions are more clearly severable.” *Id.*

19 Moreover, under L&I’s regulations, the precise amount of time spent performing  
20 managerial work is not even a factor when the salary rate exceeds \$250 per week, *see*  
21  
22  
23

1 WAC 296-128-510(5)&(6); WAC 296-128-520(4),<sup>14</sup> and to the extent it is relevant, it is  
 2 not dispositive, *see Reed v. City of Asotin*, 917 F. Supp. 2d 1156, 1162 (E.D. Wash.  
 3 2013).<sup>15</sup> Rather, the key consideration in assessing whether an individual is exempt from  
 4 Washington's overtime requirement is the "relative importance" of the individual's  
 5 managerial responsibilities to "the functioning of the employer as a whole." *Id.* For  
 6 example, in *Reed*, in which a former police chief sought overtime compensation, the  
 7 court concluded that the plaintiff's managerial duties, which occupied only 40% of his  
 8 time, but which included developing policies for the police department, assigning tasks to  
 9 subordinates, evaluating officer performance and making recommendations to the mayor  
 10 concerning promotion and discipline, participating in the budgeting process, and meeting  
 11 with city council members, various officials, and the public, were "clearly central" or  
 12 "crucial" to "the successful management and operation" of the police department. *Id.* at  
 13 1162, 1164.

14 **5. Individual Issues Predominate**

15 In this case, to assess whether plaintiff can establish on a class-wide basis that  
 16 Assistant Managers play no significant managerial role, the Court must consider two

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17  
 18 <sup>14</sup> When the salary rate is below \$250 per week, however, and the individual works in a retail or  
 19 service establishment, the individual must devote less than 40% of his or her time to activities  
 20 that are "not directly and closely related" to the performance of executive or administrative  
 21 functions to qualify for the overtime exemption. WAC 296-128-510(6); WAC 296-128-520(4).

22 <sup>15</sup> In this respect, Washington law differs from California law, and plaintiff's reliance on cases  
 23 decided by courts in California is misplaced. As explained in *Whiteway v. FedEx Kinko's Office  
 & Print Servs., Inc.*, 2006 WL 2642528 (N.D. Cal. Sep. 14, 2006), the applicable California  
 statute requires that an employee be compensated for overtime unless the employee spends more  
 than one-half of his or her work time on duties that meet the test for an executive, administrative,  
 or professional exemption. *Id.* at \*1 n.1 (quoting CAL. LAB. CODE § 515).

1 situations, one in which the Store Manager is absent and the other in which the Store  
 2 Manager is present at the store. In numerical terms, Store Managers might be absent as  
 3 little as 10% of the year, considering authorized vacations and a day off in every 12 days  
 4 of operation, and they can be gone up to 40% or 50% of the time, see Gamble Decl. at  
 5 ¶ 13, Ex. 8 to Stafford Decl.; Gonzalez Decl. at ¶ 10, Ex. 9 to Stafford Decl. (Area Store);  
 6 Willingham Decl. at ¶ 21, Ex. 25 to Stafford Decl. (Area Store); see also Flinner Decl. at  
 7 ¶ 14, Ex. 6 to Stafford Decl. (Store Manager attended week-long annual meetings,  
 8 quarterly area meetings, and monthly advertising meetings involving other nearby stores).  
 9 In addition, the Store Manager position might be vacant for some period following a  
 10 promotion, transfer, retirement, or discharge.<sup>16</sup> When no Store Manager is present, the  
 11 Assistant Manager's supervisory role is vital to the continued operation of the business.  
 12 See Donovan, 672 F.2d at 227 ("the person 'in charge' of a store has management as his  
 13 primary duty, even though he spends the majority of his time on non-exempt work and  
 14 makes few significant decisions"). Because, however, the extent to which Store  
 15 Managers are absent varies by individual, store, and vacancy status, the Court cannot  
 16 assess on a class-wide basis the "relative importance" of an Assistant Manager's  
 17 temporary command of the store to "the functioning of the employer as a whole."  
 18  
 19

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20 <sup>16</sup> See Gamble Decl. at ¶ 4, Ex. 8 to Stafford Decl. (Assistant Manager ran the store for six  
 21 months while Store Manager was being replaced); Martin Decl. at ¶ 9, Ex. 15 to Stafford Decl.  
 22 (upon Store Manager's transfer, Assistant Manager was solely in charge for a month); Ruetsch  
 23 Decl. at ¶ 6, Ex. 21 to Stafford Decl. (before retirement, Store Manager took two months of  
 vacation, during which Assistant Manager operated the store on his own).

1       The same is true with regard to the periods during which Store Managers are  
2 present at their stores. The record before the Court reflects that the amount of discretion  
3 given to Assistant Managers and the scope of their involvement in managerial decisions  
4 fluctuate depending on the size, type, and location of the store, the supervisory style and  
5 career phase of the Store Manager, and perhaps the capabilities and ambitions of the  
6 individual Assistant Manager. In support of his argument that the overtime exemption  
7 analysis can be performed on a class-wide basis, plaintiff has cited no case in which the  
8 level of variation demonstrated here gave rise to an order certifying a class. For the most  
9 part, the authorities cited by plaintiff concerning wage claims are distinguishable because  
10 they involve non-exempt employees challenging the manner in which their earnings were  
11 calculated or their hours were recorded.<sup>17</sup> Plaintiff relies on only four cases involving an  
12 alleged misclassification of class members for purposes of overtime compensation. See

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14       <sup>17</sup> See Abdullah v. U.S. Sec. Assocs., Inc., 731 F.3d 952 (9th Cir. 2013) (regarding meal breaks);  
15       Leyva v. Medline Indus. Inc., 716 F.3d 510 (9th Cir. 2013) (challenging the practice of rounding  
start times in 29-minute increments); Khadera v. ABM Indus. Inc., 701 F. Supp. 2d 1190 (W.D.  
16 Wash. 2010) (alleging that employer forced employees to work “off the clock”); Kirkpatrick v.  
Ironwood Commc’ns, Inc., 2006 WL 2381797 (W.D. Wash. Aug. 16, 2006) (involving piece rate  
or piecework payment system); see also Wang v. Chinese Daily News, Inc., 2014 WL 1712180  
(C.D. Cal. Apr. 15, 2014) (asserting that employer had a policy of not paying overtime wages to  
17 non-exempt employees); Giles v. St. Charles Health Sys., Inc., 294 F.R.D. 585 (D. Or. 2013)  
(concerning whether nurses should be compensated for study and test-taking time required for  
employment but not for maintaining their nursing licenses); In re Taco Bell Wage & Hour  
Actions, 2012 WL 5932833 (E.D. Cal. Nov. 27, 2012) (claiming violations of meal and rest  
break requirements for a class of hourly employees); Ramos v. SimplexGrinnell LP, 796 F. Supp.  
2d 346 (E.D.N.Y. 2011) (contending that current and former employees were not paid the  
20 “prevailing wage” on New York public works projects); Arrendondo v. Delano Farms Co., 2011  
WL 1486612 (E.D. Cal. Apr. 19, 2011) (alleging that non-exempt agricultural employees were  
21 required to perform off-the-clock work and were not reimbursed for work-related expenses);  
Lemus v. H&R Block Enters., LLC, 2010 WL 5069695 (N.D. Cal. Dec. 7, 2010) (challenging the  
22 timing of payments made to seasonal, non-exempt employees who worked as tax preparers).

1 Troy v. Kehe Food Distrib., Inc., 276 F.R.D. 642 (W.D. Wash. 2011); Whiteway v.  
2 FedEx Kinko's Office & Print Servs., Inc., 2006 WL 2642528 (N.D. Cal. Sep. 14, 2006);  
3 Tierno v. Rite Aid Corp., 2006 WL 2535056 (N.D. Cal. Aug. 31, 2006); Sav-On Drug  
4 Stores, Inc. v. Superior Court, 96 P.3d 194 (Cal. 2004). These decisions, however, do not  
5 support certification of a class in this case.

6 In Troy, unlike in this case, the discretion of individual supervisors was not at  
7 issue, and “no employee-by-employee analysis” was necessary to resolve the question of  
8 whether the defendant properly classified merchandisers and sales representatives as  
9 exempt from federal and state overtime requirements. 276 F.R.D. at 651, 654. Similarly,  
10 in both Whiteway and Tierno, the differences in job duties and responsibilities among the  
11 putative class members were minimal and did not defeat commonality. Whiteway, 2006  
12 WL 2642528 at \*6; Tierno, 2006 WL 2535056 at \*5-\*7 (indicating that the defendant  
13 exercised “a great deal of centralized control,” that the store managers at issue “perform  
14 essentially the same tasks at each store,” and that the defendant “fosters homogeneity” in  
15 “job duties, and the manner in which they are performed, by utilizing a system of close  
16 supervision”). Finally, in Sav-On, the parties did not disagree about the “reasonably  
17 definite and finite list” of tasks performed by the various operating managers and  
18 assistant managers at issue, they simply disputed whether those tasks were properly  
19 classified as “managerial” or “non-managerial.” 96 P.3d at 202. In contrast, in the  
20 present case, the parties do not differ regarding which activities are managerial in nature;  
21 rather, they offer divergent accounts of the duties delegated to or shared by Assistant  
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1 Managers and the extent to which those duties occupied the potential class members'  
 2 work day.

3 Moreover, the fact that Les Schwab previously classified all Assistant Managers as  
 4 exempt and recently reclassified them as non-exempt "does nothing to facilitate common  
 5 proof on the otherwise individualized issues." See In re Wells Fargo Home Mortg.  
 6 Overtime Pay Litig., 571 F.3d 953, 959 (9th Cir. 2009); see also Wang v. Chinese Daily  
 7 News, Inc., 737 F.3d 538, 545-46 (9th Cir. 2013) (vacating class certification and  
 8 remanding for reconsideration in light of Wal-Mart, reiterating that an employer's  
 9 uniform application of an overtime exemption policy does not give rise to a presumption  
 10 in favor of class treatment because such presumption "disregards the existence of other  
 11 potential individual issues that may make class treatment difficult if not impossible"  
 12 (quoting In re Wells Fargo, 571 F.3d at 958)).

13 Plaintiff's supplemental citation to Jimenez v. Allstate Ins. Co., 765 F.3d 1161 (9th  
 14 Cir. 2014), also misses the mark. In Jimenez, the key common question susceptible of  
 15 class-wide determination was whether class members, who were compensated on an  
 16 hourly basis, worked uncompensated overtime as a result of the defendant's "unofficial  
 17 policy of discouraging reporting of such overtime." Id. at 1163-64. The Ninth Circuit  
 18 observed that proving the existence of such informal or unofficial policy at trial would  
 19 "drive the resolution" of the class claim under the applicable three-prong test, which  
 20 requires inter alia that the defendant "knew or should have known" the class members  
 21 performed uncompensated work but "stood idly by." Id. at 1165-66 (citing Adoma v.  
 22 Univ. of Phoenix, Inc., 270 F.R.D. 543, 548 (E.D. Cal. 2010)). In this case, no suggestion  
 23

1 is made that Les Schwab paid Assistant Managers on an hourly basis during the proposed  
 2 class period or that, after converting Assistant Managers into non-exempt employees, Les  
 3 Schwab pressured them into foregoing overtime compensation.

4 **C. Rule 23(b)(3) Class Inappropriate**

5 The Court concludes that plaintiff has not made the requisite showing of  
 6 commonality to warrant certification of a class under Rule 23(b)(3).<sup>18</sup> Plaintiff's  
 7 underlying premise, namely that, despite the job description for Assistant Manager,  
 8 which would itself support the conclusion that Assistant Managers are exempt from  
 9 overtime requirements, he and all other Assistant Managers engaged primarily in manual  
 10 labor and other non-exempt tasks, is disputed by several of his former peers. Plaintiff has  
 11 therefore failed to demonstrate any common factual or legal question that predominates  
 12 over individual issues. *See Weston v. Emerald City Pizza LLC*, 137 Wn. App. 164, 151  
 13 P.3d 1090 (2007) (reversing an order certifying a class, observing that the job description  
 14 for the position at issue did not require the non-managerial work that formed the basis of  
 15 the plaintiff's claims and that the plaintiff's allegations did not establish the defendant

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16  
 17 <sup>18</sup> Plaintiff's failure to show commonality is particularly obvious with respect to his claim under  
 18 RCW 49.52.050, which is a criminal statute. The Court will treat plaintiff's claim as brought  
 19 instead under RCW 49.52.070, which authorizes a civil action for violation of subsections (1) or  
 20 (2) of RCW 49.52.050. *See Keenan v. Allan*, 889 F. Supp. 1320, 1378 n.80 (E.D. Wash. 1995).  
 21 RCW 49.52.070 permits double recovery for "wages unlawfully rebated or withheld," but it  
 22 explicitly defines as a defense an employee's knowing submission to the violation at issue. *See also Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 500-01, 663 P.2d 132 (1983) (a bona fide  
 dispute concerning whether wages were owed also constitutes a defense to willful withholding  
 within the meaning of RCW 49.52.050(2)). Whether Assistant Managers knowingly submitted  
 to receiving compensation on a salaried and profit-sharing basis and to forsaking overtime pay  
 requires the type of individualized consideration that renders the class vehicle unsuitable.

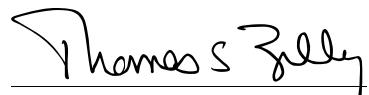
1 “engaged in a common course of conduct in relation to all potential class members”).  
2 The Court is satisfied that, in this matter, a class action would not be “superior to other  
3 available methods for fairly and efficiently adjudicating the controversy,” Fed. R. Civ. P.  
4 23(b)(3), and declines to certify the proposed class. *Cf. Stubbs v. McDonald’s Corp.*, 227  
5 F.R.D. 661 (D. Kan. 2004) (concluding, with respect to a proposed class of first and  
6 second assistant managers of McDonald’s restaurants in Kansas, that the plaintiff failed  
7 to satisfy the more lenient standard for conditional class certification under the FLSA,  
8 which requires a showing of “nothing more than substantial allegations that the putative  
9 class members were together the victims of a single decision, policy, or plan”).

10 **Conclusion**

11 For the foregoing reasons, plaintiff’s motion for class certification, docket no. 20,  
12 is DENIED. The parties’ stipulated motion, docket no. 35, to strike the trial date and all  
13 related deadlines is DENIED. The Court sua sponte EXTENDS the expert disclosure  
14 deadline from November 5, 2014, to December 22, 2014, and the discovery completion  
15 deadline from January 5, 2015, to January 30, 2015.

16 IT IS SO ORDERED.

17 Dated this 24th day of November, 2014.

18   
19

20 THOMAS S. ZILLY  
21 United States District Judge  
22  
23